IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-817

NEBRASKA PRESS ASSOCIATION, *et al.*,

Petitioners,

—v.—

THE HONORABLE HUGH STUART, JUDGE
District Court of Lincoln County, Nebraska,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, AND THE NEBRASKA CIVIL LIBERTIES UNION AS AMICI CURIAE

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INTEREST OF AMICI [1]

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members. The Nebraska Civil Liberties Union serves as the statewide affiliate. The ACLU is dedicated solely to defending the safeguards of the Bill of Rights. Central among those protections is the First Amendment's guarantee of a free press, a condition prerequisite to the continued maintenance of a free society. No less important are those provisions of the Bill of Rights designed to insure the right of a criminal defendant to a fair trial before an impartial tribunal. The ACLU has long been concerned with the vindication of both sets of rights. We participated as amicus curiae in New York Times Co. v. United States, 403 U.S. 713 (1971), urging the invalidity of the prior restraints at issue there. And we likewise joined in Sheppard v. Maxwell, 384 U.S. 333 (1966) urging that the petitioner had been deprived of the right to a fair trial. In addition, the ACLU has devoted a considerable amount of study to the problem of assuring the defendant's right to a fair trial without intruding upon the necessary prerogatives of a free press to report fully about the criminal justice process. That deliberation resulted

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1/ Letters of consent from all parties to the filing of this brief are being filed with the Clerk of the Court.

in the adoption of a policy statement on "Prejudicial Pre-Trial Publicity," which we are appending to this brief.

The American Civil Liberties Union Foundation of Northern California, the Northern California regional affiliate of the national ACLU, has a particular interest in the resolution of the issues here. It has been involved in gag order litigation for years: see, e.g., Hamilton v. Municipal Court, 270 Cal.App.2d 797 (1969)(upholding order gagging defendants and student body of University of California at Berkeley); People v. Green, Nos. L28145F-L28150 (Municipal Court of San Francisco, 1974)(gagging press in "Zebra" trial). It has pending before this Court a Petition for Writ of Certiorari testing an order of the United States District Court for the Eastern District of California enjoining in 26 California counties the showing of the film "Manson" in alleged protection of the right of fair trial of Lynette Fromme, respondent in Evans v. Fromme, No. 75-957, O.T. 1975.

STATEMENT OF THE CASE

Petitioners, various Nebraska publishers, broadcasters, journalists, wire services, and media associations, were ordered by the County Court, District Court and Supreme Court of Nebraska not to publish any but a short list of sanitized information relating to a pending criminal trial.

The prosecution and the defense in State v. Simants, B-2904, joined in seeking those orders in the criminal prosecution of Simants for alleged murder and sexual assault. From December 1, 1975, until January 8, 1976, when a trial jury was empaneled, petitioners were subject to an order of the Nebraska Supreme Court prohibiting the publication of:

> [1] Confessions or admissions against interest made by the accused to law enforcement officials;
>
> [2] Confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to representatives of the news media; and
>
> [3] Other information strongly implicative of the accused as the perpetrator of the slayings.
>
> Amended Petition ("AP"), 64a.

These prohibitions were effective as to events prior to the issuance of the order (December 1, 1975).

From October 27 to December 1, 1975, petitioners were subject to greater restraint from an earlier order of the Nebraska District Court, as modified by a stay issued on November 21, 1975, by Mr. Justice Blackmun. (AP 9a-17a; 24a-25a; 38a-42a.) From October 23 to October 27, 1975, petitioners were subject to a still more restrictive order issued by the County Court (AP 1a-8a).

The information that petitioners were thus forbidden to publish, on pain of contempt, embraced nearly every newsworthy aspect of the Simants trial, including as it did not only the three categories of publication forbidden by the Nebraska Supreme Court but also (4) technical evidence from a prosecution witness (AP 10a); (5) identity of victims of, or details of, alleged sexual assaults (AP 11a); (6) the nature and limitations of the gag orders themselves (AP 11a); and (7) any publication disapproved by the Nebraska Bar-Press Guidelines (AP 4a-8a; 13a-17a). These Guidelines are a lengthy voluntary agreement finding "generally inappropriate" the publication of many newsworthy facts relating to criminal trials, from opinions of guilt or character, prior criminal records, and results of tests to "statements...relating to...other matters which, if reported, would likely interfere with a fair trial." (AP 13a-15a.)

In justification of the original order,

the County Court, on a record consisting of articles from three daily papers (AP 58a-59a), found "a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury..." (AP 1a). The District Court, adding to this record only the testimony of the County Court judge (AP 58a), found "a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial." The Nebraska Supreme Court found, on no greater record, justification for the order of the District Court (AP 61a-64a), without embracing either standard used in the courts below.

On December 12, 1975, this Court granted certiorari to review the orders of the courts below but declined to expedite consideration of the case or to stay the December 1, 1975, order of the Nebraska Supreme Court then in effect. The latter order expired when the jury in State v. Simants was empaneled on January 8, 1976. Thereafter, the jury found the defendant guilty.

ARGUMENT

The issues reflected in this case have often been characterized as involving a "clash" of constitutional values. Our experience indicates that to so characterize the issues is to misconceive them. The "clash" between the values of free press and fair trial perceived by the courts below is not real; rarely, if ever, will there be a tension

between those two great protections sufficient to require one or the other to yield. Rather, we submit, this case can and should be resolved on the basis of three perfectly consistent propositions: (1) reporting about the functioning of the criminal justice system and the basic issues of crime and punishment is vital to our society and cannot be subjected to restraint in advance; (2)numerous remedies and mechanisms - not involving restraints on the press and not employed in this case - are available to assure the accused's right to a fair trial; and (3) any weakening of the ban on prior restraints, in the service of any supposedly competing interests, will inexorably lead to a relaxation of that vital safeguard whenever a countervailing interest is claimed to be served.

The orders of the Nebraska courts do not reach "an accommodation" between free press and fair trial, as the Nebraska Supreme Court suggested (AP 61a), but a sacrifice of one because of speculative effect on the other. For two reasons, such an accommodation is constitutionally unacceptable. First, since those orders directly restrained in advance the ability of the press to report on public court proceedings, documents and other aspects of the functioning of the criminal justice system in this particular case - including the existence of "information strongly implicative" of the accused - they are per se invalid under the First Amendment. Second, the restraints were imposed quickly and casually, with virtually no consideration of the availability of other remedies which would

safeguard the defendant's rights without infringing the petitioners', with no clear articulation of a standard by which such drastic restraints were supposedly justified, and with essentially no record whatsoever to support such extraordinary orders. The orders demonstrate the alarming ease with which the lower courts have adopted the prior restraint mechanism as a shotgun remedy for other problems, and if sustained, this Court's historic and repeated injunctions against prior restraints will become empty rhetoric.

I. THE FIRST AMENDMENT FORBIDS ANY DIRECT, PRIOR RESTRAINTS ON PRESS REPORTING OF PROCEEDINGS IN OPEN COURT, MATTERS IN PUBLIC COURT RECORDS, OR OTHER INFORMATION RELATING TO THE NATURE OF CRIMINAL PROCEEDING.

We deal here with the classic prior restraint - a judicial decree restraining in advance publication of certain categories of information and enforceable through the court's contempt powers.

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); New York Times Co. v. United States, 403 U.S. 713, 714 (1971); Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 181 (1968). In order to overcome that

presumption the government "thus carries a heavy burden of showing justification for the imposition of such a restraint." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); New York Times, supra.

> The presumption against prior restraints is heavier--and the degree of protection broader--than that against limits on expression imposed by criminal penalties.
>
> Southeastern Promotions, Ltd. v. Conrad, ___U.S.___, 43 L.Ed. 2d 448, 459 (1975).

The element of likelihood required to justify a prior restraint on speech thus nears certainty:

> ...the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjucture that untoward consequences may result.
>
> New York Times, supra, at 725-26 (Brennan, J., concurring).

Moreover, the substantive evil nearly certain to occur must be of such gravity that it has never been successfully demonstrated in this Court, which in dictum has accorded possible validity only to a prior restraint preventing injury that is a substantial threat to the

security of the nation:

> ...publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling a transport already at sea...
>
> Id. at 726-27 (Brennan, J., concurring).
>
> ...I cannot say that [the Pentagon Papers] will surely result in direct, immediate, and irreparable damage to our Nation or its people.
>
> Id. at 730 (Stewart, J., concurring).

See also Near v. Minnesota, 283 U.S. 697, 702 (1931)("...publication of the sailing dates of transports or the number or location of troops..."). Thus, the only area where this Court has sanctioned, even theoretically, the imposition of a prior restraint on the publication of otherwise lawful information has involved possible threats to the very life of the Republic.

This Court has never suggested that vital reporting about the heart of the criminal justice process is any less immune from previous restraint. Quite the contrary. As long ago as in Craig v. Harney, 331 U.S. 367 (1947), the Court recognized the public nature of proceedings in open court and records concerning them:

> A trial is a public event. What transpires in the courtroom is public property... Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.
>
> Id. at 374.

Last year this Court re-emphasized the importance of that ruling in Cox Broadcasting Corp. v. Cohn, ___U.S.___, 43 L.Ed. 328 (1975), in which the reporting of the name of a rape victim, found in court records, was held protected by the First Amendment notwithstanding a Georgia statute prohibiting such publication. In Cox the Court recognized the critical role of the media in commenting on court proceedings, noting that most citizens view court proceedings through the press rather than personally (id. at 347), and, citing Craig v. Harney, supra, held that "States may not impose sanctions for the publication of truthful information contained in official court records open to public inspection." Id. at 350. It is thus clear that those portions of the orders at issue here which prohibit the publication of information disclosed in court proceedings or records violate one of the central precepts of the First Amendment and cannot stand.

Nor can the rationale of the Cox case be

limited to the right to report information gleaned from public court proceedings and official records and documents open to the public. While such sources are "the basic data of governmental operations," 43 L.Ed. 2d at 347, they are not only data. Protection for the vital press functions which this Court identified in Cox cannot be made to vary depending on the source of the information reported. In either case, the press role remains the same:

> With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. See Sheppard v. Maxwell, 384 U.S. 333, 350 (1966). Cox Broadcasting Corp. v. Cohn, supra, 43 L.Ed.2d at 347.

Similarly, cases articulating standards for determining whether a subsequent conviction for contempt of court by publication would be justified cannot sustain the validity of prior restraints on reporting about the details of criminal prosecutions. Thus, although the Court has discussed the kind of showing which might justify subsequent punishment because of the impact which an out-of-court statement might have had on the administration of justice, those cases involved after-the-fact assessments of the measurable impact of such statements. Even in that context, this Court has consistently adhered to

the principle that considerations of fair trial do not justify the imposition of sanctions on otherwise protected speech absent a showing that the speech presents a "clear and present danger" to a fair judicial proceeding. Bridges v. California, 314 U.S. 252, 263 (1941); Pennekamp v. Florida, 328 U.S. 331, 348 (1946); Craig v. Harney, 331 U.S. 367, 373 (1947); Wood v. Georgia, 370 U.S. 375, 384 (1962). 2/ Thus, the test for the permissible subsequent punishment of speech in the name of a fair trial is a stringent one:

> The fires which [the speech] kindles must constitute an imminent, not merely a likely, threat to the administration

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2/ True, none of these cases involved protection of a petit jury, but individual justices and courts of appeal alike have since ruled that the same standards are applicable. Nebraska Press Ass'n. v. Stuart, 1975 CCH Sup.Ct. Bull.B 205, 217 (1975)(Blackmun, J., on Reapplication for Stay); Times-Picayune Publ. Corp. v. Schulingkamp, 42 L.Ed.2d 17 (1974)(Powell, j., on Application for Stay), appeal dismissed as moot, ___U.S.___, 43 L.Ed.2d 667 (1975); CBS, Inc. v. Young, 522 F.2d 234, 238 (6th Cir. 1975); Chase v. Robson, 435 F.2d 1059, 1061 (7th Cir. 1975); United States v. Dickinson, 465 F.2d 496, 507 (5th Cir. 1972); In re Oliver, 452 F.2d 111, 114 (7th Cir. 1971). Contra: United States v. Tijerina, 412 F.2d 661, 666 (10th Cir. 1969), cert. denied, 396 U.S. 990.

> of justice. The danger must not be remote or even probable; it must immediately peril. Craig v. Harney, supra at 376.

In no such case has this Court ever found that the stringent test had been met. 3/

Therefore, since the standard even for subsequent punishment of speech because of its impact on the judicial process is such a stringent one and has in fact never been met in this Court, and given "the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system," New York Times Co. v.

3/ The same standards for judging whether subsequent punishment should be imposed on speech concerning the judicial process have, with some variations, been employed to restrain the conduct of the participants in the judicial process. See, e.g., Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970); CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir.1975). Amici are of the view that the imposition of sanctions against law enforcement and prosecution officials - the major sources of prejudicial publicity - is appropriate. But the issues of subsequent punishment and the issues of sanctions on official participants in the criminal justice process are quite different from the issue here - direct and prior restraints against the news media.

United States, supra, 403 U.S. at 730-31 (White, J., concurring), there can be no justification for any prior restraints on that most narrow category of speech about judicial proceedings which might arguably be subject to subsequent punishment. This is so because of the critical distinction between punishing speech after the fact and suppressing it in advance. As the Court just recently observed:

> The presumption against prior restraints is heavier - and the degree of protection broader - than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable. Southeastern Promotions, Ltd. v. Conrad, supra, 43 L.Ed.2d at 459.

In light of the presumption against prior restraints "deeply etched" in our law as a free society, and since no decisions of this Court exempt reporting about criminal matters from the ban against prior restraints, the

order below cannot stand. Nor, as we will show, do the interests of the criminal defendant require a contrary conclusion.

II. THE SOCIETAL INTERESTS IN ASSURING FAIR TRIALS TO CRIMINAL DEFENDANTS CAN BE ACHIEVED IN A VARIETY OF WAYS OTHER THAN IMPOSING PROHIBITED PRIOR RESTRAINTS ON THE PRESS.

The ruling below was premised on the assumption that without direct prior restraints on the press, the defendant's rights to a fair trial could not be assured. Even assuming the premise to be correct - and there is no showing in this record to support that assumption - that would still not justify the extraordinary mechanism of an injunction against publication. But given the variety of mechanisms that were available yet not employed, the rule against prior restraints, plus even the more normal doctrine that speech may not be infringed if any narrow, less intrusive alternatives will suffice to protect the governmental interests involved, see Grayned v. City of Rockford, 408 U.S. 104 (1972); Gooding v. Wilson, 405 U.S. 418 (1972), combine to render the orders below uniquely intolerable.

This Court's opinion in Sheppard v. Maxwell, 384 U.S. 333 (1966), recognized these principles because it rejected an invitation to examine the propriety of direct restraints on media publication, finding that several

available methods of limiting prejudicial publicity, not used by the trial judge, would have sufficed to protect the interests in a fair trial:

> ...the judge never considered other means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influence. We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial and so do not consider what sanctions might be available against a recalcitrant press...
>
> Id. at 358.

Sheppard invited courts to "take such steps by rule or regulation that will protect their processes from prejudicial outside interferences," identifying several such steps. Id. at 363. This suggestion was taken seriously by bench and bar; it produced at least three major studies of possible preventive measures, chief among which was the "Kaufman Report," officially known as the Report of the Committee of the Judicial Conference of the United States on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391 (1968). It reflects two years of study by the full Committee and its Subcommittee to Implement Sheppard v. Maxwell, and contains numerous specific suggestions for solution of the problem--among them regulation of public discussion by attorneys and all other courthouse personnel, control over the seating and conduct of spectators and

media personnel, a ban on television and radio in the courtroom, and more liberal use of traditional techniques such as continuance, change of venue, voir dire, sequestration of jurors and witnesses, and cautionary instructions.

In these respects the Kaufman Committee agreed with and relied heavily upon the report of the "Medina Committee," 4/ a blue-ribbon panel of the New York Bar which had recently studied the same issues, and the "Reardon Committee," 5/ a similar panel of the American Bar Association.

All three groups considered and rejected the approach used by the Nebraska courts here --direct restraint on media publication--in favor of the less intrusive procedural alternatives mentioned above. 6/

4/ Freedom of the Press and Fair Trial: Final Report with Recommendations by the Special Committee on Radio, Television and the Administration of Justice of the Association of the Bar of the City of New York (Columbia University Press, 1967).

5/ American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press (Tentative Draft, 1966).

6/ Kaufman Committee, 45 F.R.D. at 402-03; Reardon Committee, p. 69; Medina Committee, p. 45.

Two of the major curatives suggested by the bench and bar in the wake of Sheppard are now commonplace--restrictions on statements by prosecuting attorneys and courthouse and law enforcement personnel, and voluntary restraint by the media themselves. 7/ The wisdom of both these courses is endorsed by amici. The ACLU policy in this respect is attached to this brief as Appendix A.

Compared to direct prior restraints, restrictions on statements by prosecuting attorneys, court personnel, witnesses, and law enforcement officers are lesser intrusions and are subject to different constitutional considerations, including the roles of those persons as officers of the criminal justice process and the nature of the jurisdiction the trial court therefore retains over them. Sheppard, supra at 363. The limits imposed by the First Amendment on this category of restraints is not at issue here; it is enough for present purposes

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7/ The ACLU opposes restraints on the speech of a criminal defendant or his attorney. The former, who usually speaks through the latter, often faces community sentiment already marshalled against him, is before the court only by coercive process, is the party most interested in exposing claimed abuses of the prosecutorial power, and is, after all, the beneficiary of the Sixth Amendment's guarantee of an impartial jury. See Appendix A, pp. 5a-6a, infra.

to recognize the effectiveness of such restraints, soberly weighed, in reducing prejudicial publicity, particularly at the pretrial stage.

Voluntary restraint on the part of the media now makes obsolete the circuslike atmosphere found in Sheppard, supra, as the Nebraska Supreme Court recognized here.8/ "In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast." Cox Broadcasting Corp. v. Cohn, supra at 350, citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

By far the most crucial tools in guaranteeing an impartial jury are found in the procedures governing its actual selection. Too often trial courts assume (as here) that careful voir dire will not serve for this purpose, without heeding the many techniques available in voir dire to ensure the selection of impartial jurors. See, e.g., Silverthorne v. United States, 400 F.2d 627, 635-40 (9th Cir. 1968), and cases cited.

Among the techniques available to increase the usefulness of voir dire in eliminating prejudiced jurors is examination of each

8/ "The press, in fact, appears to have followed the voluntary guidelines to which they apparently were parties." AP 62a.

prospective juror out of the presence of the others, to minimize the temptation to seem qualified. See Reardon Committee, supra, n. 5, Recommendation 3.4(a). A second suggestion of the American Bar Association involves statutory change where needed to permit selection of a jury from outside the area in which publicity has been most intense. Id. Recommendation 3.4(c). Even more important is allowing defense counsel to conduct voir dire himself--a technique much more likely, because of counsel's adversary role and greater knowledge of the case, to uncover potential prejudice. See Babcock, Voir Dire: Preserving its "Wonderful Power," 27 Stanf.L. Rev. 545, 548-49 (1975); cf. F.R.Crim.P. 24(a).

Greater attention to challenges for cause and peremptory challenges will also aid in ensuring impartial jurors. As this Court had recent occasion to say, in Groppi v. Wisconsin, 400 U.S. 505, 510 (1971):

> Another way is to provide a method of jury qualification that will promote, through the exercise of challenges to the venire--peremptory and for cause--the exclusion of prospective jurors infected with the prejudice of the community from which they came.

The scope of the traditional challenge for cause is subject to the overriding constitutional requirement of an impartial jury and must yield to what this Court has called "the presumption of partiality," Reynolds v. United States, 98 U.S. 145, 156 (1878), a presumption that arises whenever publicity has been so great as to make likely the existence of pre-

judice in large segments of the community. Irvin v. Dowd, 366 U.S. 717, 727 (1961).

Peremptory challenges are always limited in number (see, e.g., F.R.Crim.P. 24(b)) and have nearly always been exhausted in the relevant cases that have reached this Court. See, e.g., Rideau v. Louisiana, 373 U.S. 723, 725 (1963); Beck v. Washington, 369 U.S. 541, 558 (1962). But voir dire is in American law the accepted predicate for the exercise of peremptory challenges, which exist "to eliminate extremes of partiality" and which are "a necessary part of trial by jury." Swain v. Alabama, 380 U.S. 202, 219 (1964). Otherwise valid procedural limitations imposed on the number of peremptory challenges must, therefore, in a proper case, yield to the constitutional necessity of an impartial jury. Groppi v. Wisconsin, supra.

There are so many alternative methods to ensure impartial jurors short of direct restraints on free speech that a case in which the rights of free speech and fair trial are actually in conflict may never reach this Court. Certainly Sheppard v. Maxwell, supra, in which this Court held that such alternatives "would have been sufficient to guarantee" a fair trial, 384 U.S. at 358, is not such a case. Certainly this case, in which prior restraints were imposed far in advance of trial on nothing more than speculation, is not such a case.

Amici believe that the careful and proper use of all available measures short of prior

restraints will suffice to guarantee a fair trial in nearly every sensational case. In those very few cases to the contrary, such remedies as change of venue at the defendant's request--see, e.g., Groppi v. Wisconsin, supra; Rideau v. Louisiana, supra; Sheppard v. Maxwell, supra--and continuance at the defendant's request while publicity abates (cf. Ehrlichman v. Sirica, 42 L.Ed.2d 25 (1974)(Burger, C.J., as Circuit Justice), will usually be available. It is not inconceivable that a unique case in which all alternatives are exhausted may require reversal, or, to preserve the right to speedy trial, even dismissal. But it is inconceivable that this very remote possibility could serve as the justification for the kind of direct restraints on news reporting permitted by the courts below.

CONCLUSION

For the foregoing reasons, amici respectfully urge that the orders of the Nebraska courts be reversed.

Respectfully submitted,

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January, 1976 — Attorneys for Amici Curiae

APPENDIX

American Civil Liberties Union
Policy Statement

POLICY #212

Prejudicial Pre-Trial Publicity

One of the most difficult problems the Union has been called upon to resolve is that raised by the publicizing of pending criminal trails. On the one hand, the Union has steadfastly held as its core principle the inviolability of First Amendment freedoms, including freedom of the newspapers and electronic media to report all matters that they hold to be newsworthy. On the other hand, it has consistently urged even more rigorous standards of due process in criminal proceedings, including methods of ensuring impartial judges and juries.

Any attempt to suggest proper guidelines in this area doubtlessly will offend what many regard as a virtually absolute right to report events that qualify as news. Yet it is equally certain that the release or reporting of information relating to a criminal prosecution can, in a significant number of instances, effectively destroy the right of an individual to a fair trial. For, in a widely publicized case, that defendant often must either take his chances with a jury whose members he knows have been exposed on numerous occasions to the press' version of the crime, or forego the constitutional right and protection of a jury trial, trusting to the supposedly greater objectivity of a judge.

The general recognition of the need to assure a fair trial has resulted in the adoption, by the American Bar Association and other professional, legal and journalistic organizations, of new standards for this area.

The ACLU concurs in many of these new standards aimed at preserving the historic right to a fair trial without unduly limiting public discussion and public understanding of the machinery of justice.

Regarding specific standards, the ACLU recommends that all officials involved in the enforcement of law and prosecution of criminal defendants under the local, state, and federal laws abide by the following guidelines which apply to the release of information to news media from the time of a prosecutor's focus on the particular defendant until the proceeding has been terminated by trial or otherwise:

1) No statement of information should be released for the purpose of influencing the outcome of a trial.

2) Subject to specific limitations imposed by law or court order, officials may make public the following:

   (a) Defendant's name, age, residence and similar background other than race, religion, employment, and marital status;
   (b) Substance or text of charge;
   (c) Identity of investigating and arresting agency and length of investigation.

   (d) Time and place of arrest.
   (e) But none of the above information should be disclosed where such disclosure would be prejudicial comment on the case or circumstances of arrest.

3) No information should be released concerning the criminal or arrest record or confession of a person accused of crime.

4) No information should be released by officials concerning:

   (a) Observations about a defendant's character.
   (b) Statements, admissions, confessions, or alibis attributable to a defendant.
   (c) References to investigative procedures (fingerprints, polygraph tests, etc.)
   (d) Statements concerning identity, credibility, or testimony of prospective witnesses.
   (e) Statements concerning evidence or argument in the case.
   (f) Circumstances surrounding arrest (residence, use of weapons, etc.)

5) Officials in charge of custody of a defendant must protect him from being photographed or televised while in custody. No photographs of defendant should be released unless they serve a proper investigative function.

6) None of these restrictions are intended to apply to release of information concerning a person accused of crime when such release is deemed necessary to apprehend him.

The most troublesome issue has been the question of how best to enforce these informational standards in order to ensure the defendant's right to a fair trial. The Union has taken note of the cooperation between the bar and the press which has resulted in the formulation of voluntary press guidelines. Such voluntary press codes have apparently been adopted in almost half of the states. They are premised on the theory of self-regulation by the press and ultimately rely on the discretion of news editors.

The main difficulty is whether the voluntary compliance approach is effective in preserving the defendant's right to a fair trial. Until it is shown that the voluntary approach is effective in safeguarding the defendant's right to a fair trial, we favor the direct application of sanctions against the public officials who release prejudicial information. If, in addition to these restrictions, news media want to refrain voluntarily from publishing any prejudicial information they do obtain, the ACLU would of course support such self-restraint. But we cannot support voluntary codes in lieu of sanctions against law enforcement officials.

Regarding the use of sanctions, the ACLU favors directing sanctions against law en-

forcement officers and prosecuting attorneys responsible for presenting a case to the press instead of to the court. One simple method of control is the adoption of specific administrative measures and policy statements by police departments and presecuting attorneys' officers to guide the conduct of employees. Improper release of information would thereby be grounds for disciplinary action.

In addition, a procedure should be adopted by rule or statute in all courts, allowing judges to admonish publicly law enforcement officers and prosecution attorneys responsible for aiding or creating prejudicial publicity. The court could also refer the matter to the appropriate bar association committee on ethics. Aside from the advantages of its deterrent effect, the proposal would enable a judge to act immediately after the release of prejudicial publicity, rather than wait, as is now done, until the trial to exercise his limited power of instructing a jury to disregard newspaper comment - when it is generally too late to dissipate the effects of prejudicial reporting.

The ACLU believes that a defense attorney in criminal proceedings should not be subject to judicial sanction for pre-trial statements to the press concerning his client or the circumstances to which the pending litigation relates. There are several reasons for treating defense counsel in criminal prosecutions differently from prosecution attorneys:

1) Public prosecutors are apt not to

prosecute cases that are against the general public sentiment, while defense counsel often have the burden of representing an interest or person that is disfavored by the majority of the community;

2) There is a generally held presumption that the prosecutor has acted in the public interest in proceeding against the defendant, and therefore statements by the prosecutor are more readily believed. On the other hand, there is no such presumption that the defense counsel is acting in the public interest; his remarks will be received by the public with the thought that they are made on behalf of his client whom "the people," through the prosecutor, have charged with a crime;

3) Defense counsel often faces a community sentiment already well-marshalled against the defense.

4) The concept of "fair trial" in the present context is essentially to guarantee the accused individual a trial by a jury that is free of prejudice. Absent this premise there would be little reason for adding judicial sanctions to enforce the nearly universally accepted professional self-restraint counsel have traditionally imposed on themselves to assure that the judicial process is a fair one.

The present narrow scope of the traditional challenge for cause should be expanded to permit challenge of any juror who has gained a substantial degree of knowledge about a case from pre-trial publicity, whether or not the juror thinks he is impartial. This method would also be a further discouragement to police and prosecuting attorneys who might instigate prejudicial publicity in the hope of making convictions easier to obtain, because it would disqualify many prospective jurors and thus delay trial. When pre-trial publicity, despite all precautions, reaches virtually all members of a community, a change of venue is usually possible. In appropriate cases where extensive pre-trial publicity, prejudicial to the defendant, has emanated from the government, the defendant shall be entitled to a dismissal of the charges. In any event, difficulty in securing an impartial jury is a reasonable price to pay for ensuring that the right to a fair trial will not be destroyed by intentional efforts to sway the community through publicity.

The Union feels that at the present time it would be a mistake to enact sanctions directly against the press. Unless experience under the new rules regulating conduct of officials who are more intimately a part of the judicial process shows them to be inadequate, the press should not be subjected to controls that may well violate fundamental constitutional rights.

The ACLU suggests that the Judicial Conference of the United States explore the

problem of the potential bias that inflammatory publicity may create in judges, with a view to adopting standards governing the conduct of judges in sensational, well-publicized cases. [Board Minutes, February 6-7, 1971; Press release, April 22, 1971.]